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No. 88-203

In The

Supreme Court of the United States

October Term, 1988

WESTINGHOUSE ELECTRIC CORPORATION,
a corporation,
Petitioner,

vs.

THE WEST VIRGINIA DEPARTMENT
OF HIGHWAYS,
a corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF THE RESPONDENT IN OPPOSITION TO CERTIORARI

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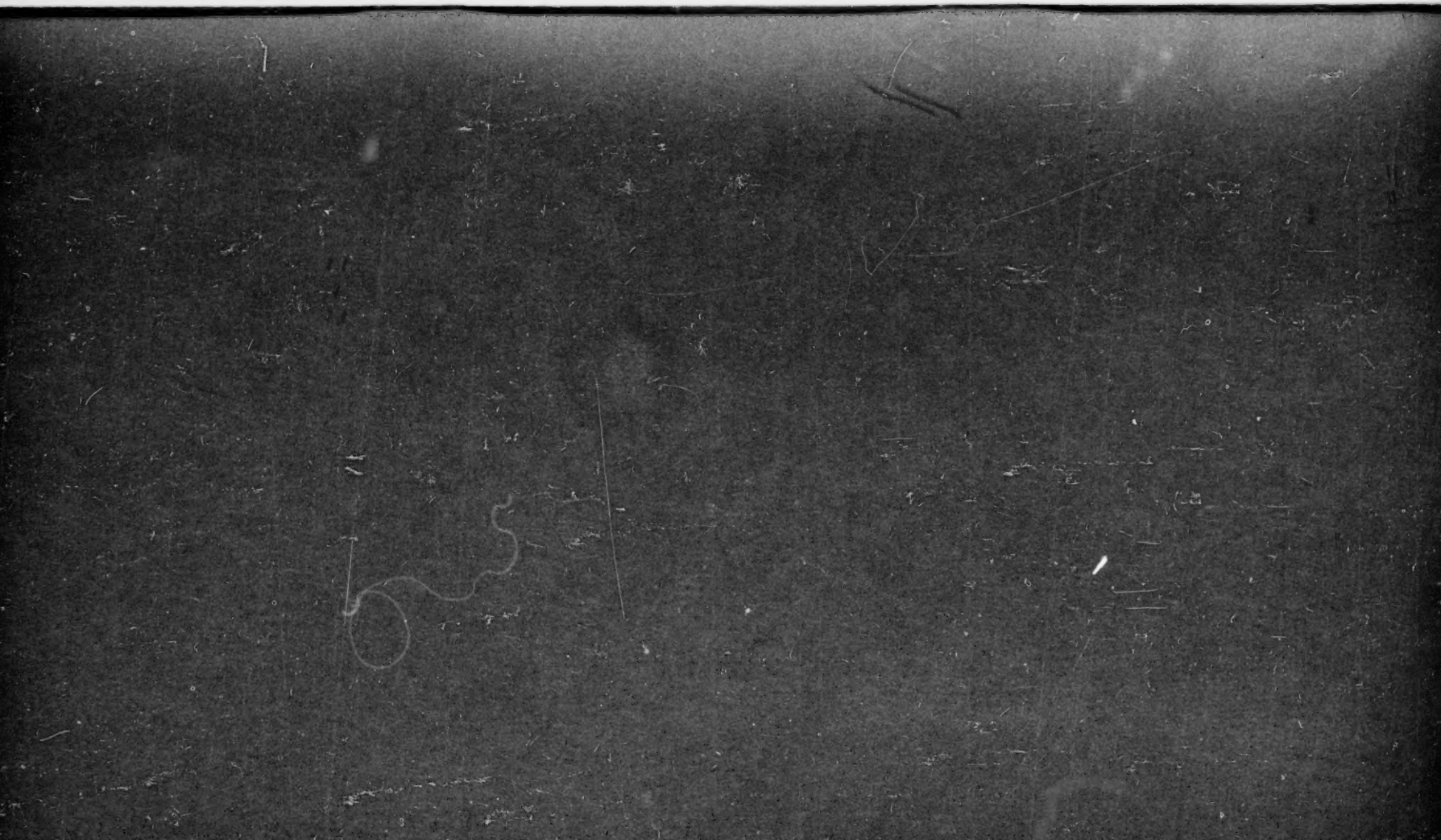

QUESTIONS PRESENTED

A. Whether or not the District Court correctly concluded that it was without subject matter jurisdiction to entertain Westinghouse Electric Corporation's action for monetary damages against the West Virginia Department of Highways due to the prohibition against such suits in Federal Court are set forth in the Eleventh Amendment to the United States Constitution.

B. Whether or not the District Court and the United States Court of Appeals for the Fourth Circuit correctly concluded that by enactment of West Virginia Code § 29-12-5 the State of West Virginia has waived the defense of sovereign immunity only for suits in state court and has not made the specific waiver required by *Atascadero State Hospital v. Scanlon,* 473 U.S. 234 (1985) to waive its Eleventh Amendment immunity barring suits against the State in federal court.

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RELIEF REQUESTED

Respondent West Virginia Department of Highways requests the Court to deny Westinghouse Electric Corporation's petition for a Writ of Certiorari to review the judgment in the United States Court of Appeals for the Fourth Circuit.

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STATEMENT OF FACTS

For purposes of this petition for a Writ of Certiorari, Respondent accepts the facts recited in Petitioner's brief with the following addition: Under the policy arrangement between the State of West Virginia and CNA Insurance Company the premium is "retrospectively rated" so that the State is required to reimburse CNA dollar for dollar for each claim dollar paid out in the previous year.

———o———

ARGUMENT

A. THE DISTRICT COURT PROPERLY HELD THAT THE ELEVENTH AMENDMENT BARS WESTINGHOUSE'S ACTION IN FEDERAL COURT FOR MONETARY DAMAGES AGAINST THE WEST VIRGINIA DEPARTMENT OF HIGHWAYS.

The immunity from suit in federal court provided to the states by the Eleventh Amendment divested the district court of subject matter jurisdiction over Westing-

house's cause of action for monetary damages against the West Virginia Department of Highways. The district court properly concluded in its Memorandum Opinion and Order that the State of West Virginia had not waived its immunity to suit *in federal court* and concluded for that reason it was without subject matter jurisdiction and granted the West Virginia Department of Highway's motion to dismiss pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure. *See* Memorandum Opinion and Order of June 8, 1987 Petitioner's Appendix at pages 2A-5A. The Eleventh Amendment provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State or by Citizens or Subjects of any Foreign State.

Although the amendment does not specifically speak to suits by citizens of one state against another state this Court has ruled that such suits are barred by the amendment. *Hans v. Louisiana,* 134 U.S. 1 (1890). The decision in *Hans* was in recognition that suits in federal court against unconsenting states "was not contemplated by the Constitution when establishing the judicial power of the United States." *Hans v. Louisiana,* 134 U.S. at 15; *Pennhurst State Schools & Hospital v. Halderman,* 465 U.S. 89 (1984).

In providing further explanation and background to the afore-quoted language from *Hans* this Court in *Pennhurst* referred to Justice Marshall's concurring opinion in the case of *Employees v. Missouri Public Health and Welfare Department,* 411 U.S. 279, 291-292 (1973) (Marshall, J., concurring in judgment) wherein Justice Marshall ob-

served that the Eleventh Amendment "clarif[ied] the intent of the Framers concerning the reach of federal judicial power" and "restore[d] the original understanding" that States could not be made unwilling defendants in federal court. *Pennhurst State Schools & Hospital v. Halderman*, 465 U.S. at n.7. Cognizant of this basic limitation of the judicial power of federal courts, this Court has consistently applied the Eleventh Amendment to grant immunity to a state from suits brought in federal court. *Pennhurst State Schools & Hospital v. Halderman*, 465 U.S. 89 (1984); *Employees v. Missouri Public Health and Welfare Department*, 411 U.S. 279 (1973). As specifically stated in *Pennhurst*, the Eleventh Amendment represents a basic limitation on the constitutional powers granted the federal judiciary in Article III. *Pennhurst*, 465 U.S. at 98. This Court observed:

> That a State may not be sued without its consent is a fundamental rule of jurisprudence having so important a bearing upon the construction of the Constitution of the United States that it has become established by repeated decisions of this court that *the entire judicial power granted by the Constitution does not embrace authority to entertain a suit brought by private parties against a State without consent given*: not one brought by citizens of another State, or by citizens or subjects of a foreign State, because of the Eleventh Amendment; and not even one brought by its own citizens, because of the fundamental rule of which the Amendment is but an exemplification.

Pennhurst, 465 U.S. at 98-99 *quoting Ex parte State of New York*, 256 U.S. 490, 497 (1921) (italics added as per the text of the Court's opinion in *Pennhurst*).

Eleventh Amendment immunity clearly embraces Respondent West Virginia Department of Highways inas-

much as the Eleventh Amendment extends not only to the state itself but also to any of its agencies or departments. *Florida Department of Health v. Florida Nursing Home Association*, 450 U.S. 147 (1981). The monetary relief sought by Westinghouse against the West Virginia Department of Highways falls within the Eleventh Amendment prohibition because the proscription against such suits lies regardless of the type of relief sought, *Alabama v. Pugh*, 438 U.S. 281 (1978) and lies whether or not the action is premised upon federal or state law. *Pennhurst State School & Hospital v. Halderman*, 465 U.S. at 106. In rejecting the argument that the Eleventh Amendment should not apply to bar a suit in federal court where the Plaintiff alleges a violation of *state* law by a state official, this Court in *Pennhurst* held that:

> "A federal court's grant of relief against state officials on the basis of state law, whether prospective or retroactive, does not vindicate the supreme authority of federal law. On the contrary, it is difficult to think of a greater intrusion on state sovereignty then when a federal court instructs state officials on how to conform their conduct to state law. Such a result conflicts directly with the principles of federalism that underlie the Eleventh Amendment.

Pennhurst, 465 U.S. at 106.

After noting that the Eleventh Amendment "deprives a federal court of power to decide certain claims against States that otherwise would be within the scope of Art. III's grant of jurisdiction"[1] this Court also ruled that the constitutional bar created by the amendment also applies to pendant claims. *Pennhurst*, 465 U.S. at 120.

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[1] *Pennhurst State Schools & Hospital v. Halderman*, 465 U.S. 89, 119-120 (1984).

Based on the afore-cited authorities, the West Virginia Department of Highways' argument can be reduced to the following simple syllogism: The Eleventh Amendment bars suits against a state in federal court; Westinghouse's action against the Department of Highways is an action against a state in federal court; therefore, Westinghouse's action is barred by the Eleventh Amendment. Absent an unequivocal waiver of this constitutional right, the application of the amendment commends but one conclusion and that is the district court and the court of appeals properly concluded that there was no federal subject matter jurisdiction to entertain Westinghouse's action against the West Virginia Department of Highways. As the following discussion will demonstrate, the State of West Virginia has not waived its Eleventh Amendment immunity.

B. WEST VIRGINIA HAS NOT WAIVED ITS ELEVENTH AMENDMENT IMMUNITY.

The West Virgiia Department of Highways acknowledges certain well-established exceptions to the scope of the Eleventh Amendment immunity. Such exceptions, however, have been narrowly drawn and jealously guarded and, as the following discussion will demonstrate, have no applicability here. Congress, for example, may abrogate or override a state's Eleventh Amendment immunity as a part of the enforcement of the Fourteenth Amendment. *Fitzpatrick v. Bizer*, 427 U.S. 445 (1976). Any intention by Congress to override the Eleventh Amendment immunity must be expressed unequivocally and by "clear language". *Quern v. Jordan*, 440 U.S. 332 (1979); *Employees v. Missouri Public Health and Welfare Department*, 411 U.S. 279 (1973).

Similarly, the state itself may waive the immunity afforded by the Eleventh Amendment by statute or constitutional provision or by participating in particular federal programs. *Atascadero State Hospital v. Scanlon,* 473 U.S. 234 (1985); *Clark v. Barnard,* 108 U.S. 436 (1883); *Pennhurst State School & Hospital v. Halderman,* 465 U.S. 89 (1984). The intent to waive the immunity must be unequivocally clear. As stated by this Court in *Edelman,* supra:

> [c]onstructive consent is not a doctrine commonly associated with the surrender of constitutional rights, and we see no place for it here. In deciding whether a State has waived its constitutional protection under the Eleventh Amendment, we will find waiver only where stated 'by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction.'

415 U.S. at 673, 39 L.Ed.2d at 678 (quoting, in part, *Murray v. Wilson Distilling Company,* 213 U.S. 151, 29 S.Ct. 458, 53 L.Ed. 742 (1909)).

The existence of limited and narrowly construed exceptions to Eleventh Amendment immunity is of no benefit to Westinghouse since neither Congress nor the State of West Virginia have expressed any intent to override or waive the immunity as it applies to the present case.

Westinghouse cannot avoid the jurisdictional bar of the Eleventh Amendment by any contention that West Virginia has consented to suit against it in federal court. The standard to be used in determining whether a waiver of a Eleventh Amendment immunity has been made by a state was recently stated by Justice Powell in *Atascadero State Hospital v. Scanlon*:

> [t]he test for determining whether a State has waived its immunity from federal court jurisdiction is a stringent one. Although a State's general waiver of sovereign immunity may subject it to suit in state court, it is not enough to waive the immunity guaranteed by the Eleventh Amendment. [Citation omitted]. As we explained just last Term, 'a State's constitutional interest in immunity encompasses not merely *whether* it may be sued, but *where* it may be sued.' [Citation omitted]. Thus, in order for a state statute or constitutional provision to constitute a waiver of Eleventh Amendment immunity, it must specify the State's intention to subject itself to suit in *federal court*.

473 U.S. at 241 (emphasis in original). Application of this "stringent" standard to the Department of Highways in the present case yields the inescapable conclusion that West Virginia has not waived its Eleventh Amendment immunity. In the first place, there is simply no constitutional or statutory provision evidencing any intention to permit suit against the State in federal court. In fact, the West Virginia Constitution actually provides an absolute prohibition against such suits. Under Article VI, § 35:

> [t]he State of West Virginia shall never be made defendant in any court of law or equity, except the State of West Virginia, including any subdivision thereof, or any municipality therein, or any officer, agent, or employee thereof, may be made defendant in any garnishment or attachment proceeding, as garnishee or suggestee.[2]

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[2]As the West Virginia Supreme Court of Appeals observed in *Pittsburgh Elevator Company v. West Virginia Board of Regents*, 310 S.E.2d 675 (W.Va. 1983) West Virginia is one of only eleven jurisdictions retaining the doctrine of sovereign immunity. In fact, Justice McGraw noted that West Virginia is one of only three jurisdictions whose constitutional provision contains an absolute prohibition against suit. 310 S.E.2d at 680-81, n.6.

Therefore, West Virginia's specified intention relative to sovereign immunity is diametrically opposed to any assertion of an Eleventh Amendment waiver.

Westinghouse's contention in its petition for certiorari that West Virginia has waived its Eleventh Amendment immunity by the enactment of West Virginia Code § 29-12-5 (1980 Replacement Vol.) is without merit. This Code section can be read in vain in search of a specific Eleventh Amendment waiver necessary to satisfy the *Atascadero* standard. This statute relates to the State Board of Insurance of West Virginia and section (a) provides, in its entirety:

> [T]he board shall have general supervision and control over the insurance of all state property, activities and responsibilities, including the acquisition and cancellation thereof; determination of amount and kind of coverage, included (including) but not limited to deductible forms of insurance coverage, inspections or examinations relating thereto, reinsurance, and any and all matters, factors and considerations entering into negotiations for advantageous rates on and coverage of all such state property, activities and responsibilities. Any policy of insurance purchased or contracted for by the Board shall provide that the insurer shall be barred and estopped from relying upon the constitutional immunity of the State of West Virginia against claims or suits. The board may enter into any contracts necessary to the execution of the powers granted to it by this article. It shall endeavor to secure the maximum of protection against loss, damage or liabilities to state property and on account of state activities and responsibilities by proper and adequate insurance coverage through the introduction and employment of sound and accepted methods of protection and principles of insurance. It is empowered and directed to make a complete survey of all pres-

ently owned and subsequently acquired state property subject to insurance coverage by any form of insurance, which survey shall include and reflect inspections, appraisals, exposures, fire hazards, construction, and any other objectives or factors affecting or which might affect the insurance protection or coverage required. It shall keep itself currently informed on new and continuing state activities and responsibilities within the insurance coverage herein contemplated. The board shall work closely in cooperation with the state fire marshal's office in applying the rules and regulations of that office insofar as the appropriations and other factors peculiar to State property will permit. The board is given power and authority to make rules and regulations governing its functions and operations and the procurement of state insurance, but shall not make or promulgate any rules or regulations in contravention of or inconsistent with the laws or rules and regulations governing the office of insurance commissioner of West Virginia.

The board is hereby authorized and empowered to negotiate and effect settlement of any and all insurance claims arising on or incident to losses of and damages to state properties, activities and responsibilities hereunder and shall have authority to execute and deliver proper releases of all such claims when settled. The board may adopt rules and procedures for handling negotiating and settlement of all such claims. All such settlements and releases shall be effected with the knowledge and consent of the attorney general.

Based upon the provisions of the above-quoted statute, the West Virginia Supreme Court of Appeals has held that suits which allege and seek recovery under and up to the limits of the State's liability insurance coverage fall beyond the sovereign immunity provision of West Virginia Constitution Article VI, § 35. *Pittsburgh Elevator Company v. West Virginia Board of Regents,* 310 S.E.2d

675 (W.Va. 1983). Enactment of West Virginia Code § 29-12-5 and the decision in *Pittsburgh Elevator Company,* 310 S.E.2d 675 (W.Va. 1983), however, cannot be deemed a waiver of the sovereign immunity accorded West Virginia by the Eleventh Amendment. First, the opinion of the court squarely rejects any suggestion that the West Virginia legislature has waived immunity. The court held:

> [t]he Legislature has not, by enactment of West Virginia Code § 29-12-5, sought to waive the State's constitutional immunity from suit. Rather, we read the statute as the Legislature's recognition of the fact that where recovery is sought against the State's liability insurance coverage, the doctrine of constitutional immunity, designed to protect the public purse, is simply inapplicable.

Pittsburgh Elevator Company, 310 S.E.2d at 688-89.

The reasoning behind the above-quoted language of the court's opinion becomes clear when prior decisions of the West Virginia Supreme Court of Appeals dealing with the ability of the Legislature to waive immunity are considered. The Court has consistently held that the Legislature cannot waive the State's constitutional immunity from suit. *See Boggs v. Board of Education,* 244 S.E.2d 799 (W.Va. 1978); *Estate ex rel. Scott v. Taylor,* 154 W.Va. 151, 160 S.E.2d 146 (1968).

Second, this United States Supreme Court has made it abundantly clear that a state's waiver of immunity to suit *in state courts* is not enough to constitute a waiver of Eleventh Amendment immunity. *Atascadero State Hospital v. Scanlon,* 473 U.S. 234 (1985); *Florida Department of Health v. Florida Nursing Home Association,* 450 U.S. 147, 150 (1981). Accordingly, the language of West Vir-

ginia Code § 29-12-5 could, at best, only be construed as waiving sovereign immunity *in state courts;* the statute contains no waiver of the State's immunity to suits in federal court. Directly supporting this conclusion is the United States Supreme Court's decision in *Florida Department of Health v. Florida Nursing Home Association,* wherein this Court determined that no Eleventh Amendment waiver had occurred notwithstanding the fact that the state agency involved had been designated as a "body corporate" with the capacity to "sue and be sued" by the Florida Legislature. 450 U.S. at 149.

Even Westinghouse implicitly recognizes in its brief that West Virginia Code § 29-12-5 does not contain the specific waiver language required to forfeit the State's Eleventh Amendment immunity. Westinghouse argues that the statute "should not be so narrowly construed as to imply that the Legislature of the State of West Virginia was waiving only its state constitutional immunity where insurance is involved." *See* Petitioner's Brief at page 11. Westinghouse must ask this Court to "construe" the statute to "imply" an Eleventh Amendment waiver because the statute itself does not contain language waiving West Virginia's Eleventh Amendment immunity. This Court has counseled against attempts to construe or infer an Eleventh Amendment waiver. Again, the *Pennhurst* decision is instructive. Therein this Court stated that "we have insisted, however, that the State's consent be unequivocally expressed." 465 U.S. at 99, *citing Edelman v. Jordan,* 415 U.S. 651, 673 (1974). *See also Quern v. Jordan,* 440 U.S. 332, 342 (1979) (42 U.S.C. § 1983 does not override State's Eleventh Amendment Immunity.) The Court in *Pennhurst* went on to explain why the Court was retic-

ent to find a constructive waiver of a State's Eleventh Amendment Immunity:

> Our reluctance to infer that a State's Immunity from suit in the federal court has been negated stems from recognition of the vital role of the doctrine of sovereign immunity in our federal system. A State's constitutional interest in immunity encompasses not merely *whether* it may be sued, but *where* it may be sued.

465 U.S. at 99-100 (emphasis in original).

Westinghouse's argument that this Court should find a waiver of an Eleventh Amendment Immunity in West Virginia Code § 29-12-5 because the West Virginia Legislature was aware of the Eleventh Amendment at the time it enacted the statute and would have not used the words "constitutional immunity" if it meant only to waive "state constitutional immunity", *see* Petitioner's Brief at page 11, also fails. This argument is directly contrary to the teaching of *Edelman v. Jordan* that "constructive consent is not a doctrine commonly associated with the surrender of constitutional rights" and has "no place" in deciding whether a state has waived its Eleventh Amendment Immunity. *Edelman v. Jordan,* 415 U.S. at 673.

In further response to this argument, the West Virginia Department of Highways would point out that the West Virginia Legislature is presumed to know the law and therefore knows what specific language is required to waive the State's Eleventh Amendment immunity. The Legislature has chosen not to include the type of specific waiver language required to waive Eleventh Amendment immunity thereby evincing Legislative intent ***not*** to waive the State's immunity from suit in federal court.

Of course, the same analysis applies to Westinghouse's arguments regarding West Virginia Code § 33-6-14(a) and the amended statute West Virginia Code § 33-6-14(a) (1986). It should also be pointed out that the amendment to the statute effective June 1, 1986 discussed in Petitioner's brief at page 12 was passed by the Legislature *after* decisions by the Supreme Court establishing the stringent, unequivocal standard for determining whether a state has waived its Eleventh Amendment immunity. With presumptive knowledge of these decisions the Legislature still chose not to include the requisite specific waiver language in the statute so no constructive waiver (even if such a concept exists and *Edelman* instructs that constructive consent is not appropriate in this analysis) can be found in any of the statutes cited by Westinghouse.

Westinghouse's reliance on the case of *G. M. McCrossin, Inc. v. West Virginia Board of Regents,* 355 S.E. 2d 32 (W.Va. 1987) is unfounded. In *McCrossin* the West Virginia Supreme Court of Appeals was asked to overrule its previous decision in *The City of Morgantown v. Ducker,* 153 W.Va. 121, 168 S.E.2d 298 (1969) holding the Board of Regents enjoys constitutional immunity from suit. The court refused to do so. 355 S.E.2d at 33. The case in no way involved the doctrine of Eleventh Amendment immunity and it is clear from the procedural history of the case that the litigation was entirely within the state court system. 355 S.E.2d at 33. For this reason *McCrossin* is totally inapposite to the case at bar.

Further, to the extent *McCrossin* can be read to express concern that the doctrine of sovereign immunity

may deprive a citizen of his right to require the government to answer for alleged wrongdoing, that concern does not militate against a proper application of Eleventh Amendment immunity for the simple reason that the Eleventh Amendment does not deprive a citizen of his right to sue a state; it only acts as a constitutional prohibition against suits against states in a specific forum, i.e., federal court. The Eleventh Amendment, therefore, does not serve to grant to government power which is "so absolute that it could not be made to answer for the wrongs committed in its name." *Cf. McCrossin,* 355 S.E.2d at 34. Rather, the Amendment simply requires that a state must be made to answer *in state court* for any alleged wrongdoing.

In addition to the opinion reported below from the United States Court of Appeals for the Fourth Circuit, the Fourth Circuit has previously recognized the important distinction between sovereign immunity and Eleventh Amendment immunity in the case of *Giancola v. State of West Virginia Department of Public Safety,* 830 F.2d 547 (4th Cir. 1987). In *Giancola,* the Fourth Circuit addressed the same arguments as advanced by Westinghouse in its petition for a Writ of Certiorari, including the contention that West Virginia has waived its Eleventh Amendment immunity by the enactment of West Virginia Code § 29-12-5 relating to the State Board of Insurance. In *Giancola* the Fourth Circuit affirmed the District Court's grant of summary judgment for the State of West Virginia based on the Eleventh Amendment prohibition against suing a state in federal court. *Giancola v. State of West Virginia Department of Public Safety,*

830 F.2d at 552. The Court recognized and explained the important distinction between sovereign immunity and Eleventh Amendment immunity.

> Plaintiff's attempt to avoid the Eleventh Amendment bar by arguing that West Virginia has waived its sovereign immunity in certain limited instances. However, they fail to recognize the distinction between sovereign immunity and Eleventh Amendment immunity. The former is an immunity from suit altogether, while the latter is immunity from suit in a particular forum. A state may waive either of these immunities, but while its 'general waiver of sovereign immunity may subject it to suit in state court, it is not enough to waive the immunity guaranteed by the Eleventh Amendment.'

Giancola v. State of West Virginia Department of Public Safety, 830 F.2d at 552 *quoting Atascadero State Hospital v. Scanlon,* 473 U.S. 234, 241 (1985).

These decisions make it clear that the West Virginia insurance statutes relied upon by Westinghouse in its petition are irrelevant for the application of the constitutional analysis which requires an explicit, unequivocal waiver of the Eleventh Amendment immunity as set forth in *Atascadero, Edelman* and *Pennhurst.* Significantly, there is no decision rendered by any other court which is in conflict with the Fourth Circuit's ruling in this case. Westinghouse's reliance on *West v. Keve,* 571 F.2d 158 (3rd Cir. 1978) is misplaced because, as the Fourth Circuit has pointed out, this is a pre-*Atascadero* case and does not apply the stringent standard for waiver set out therein. See Appendix at pages 4A-5A. Further, the Court in *West v. Keve,* did *not* find an Eleventh Amendment waiver by operation of the Delaware insurance statute. The court

simply remanded the case to the district court to determine whether or not there was a waiver by the State. By contrast, the district court below has already conducted a review of the West Virginia insurance statutes as well as Westinghouse's arguments relating to waiver and has concluded the State of West Virginia has waived its sovereign immunity only to permit suits against the State *in state court* but the State of West Virginia has not waived its Eleventh Amendment immunity prohibiting suits against it in federal court. The standard for waiver set forth by this Court is the controlling standard and the respective decisions of district court and Fourth Circuit concluding West Virginia has not waived its Eleventh Amendment immunity are precisely faithful to the strict standard established by this Court in the cases discussed above. As is clear from Petitioner's brief itself, there is no conflict among the circuit courts on this issue.

CONCLUSION

The issues presented by Petitioner Westinghouse Electric Corporation are not worthy of review. The cases previously decided by this Court have established the clear, stringent standard to be applied in determining whether or not a state has waived its Eleventh Amendment immunity. The district court and the Court of Appeals for the Fourth Circuit have correctly decided the State of West Virginia has not waived its Eleventh Amendment immunity. The presence or absence of insurance is not an issue relevant to the constitutional analysis

used to decide whether or not there has been an Eleventh Amendment immunity waiver. There is no conflict among the circuit courts regarding the issues presented inasmuch as this Court has already dispositively spoken on the issue of waiver and has established the controlling standard. Respondent West Virginia Department of Highways requests this Court to deny Westinghouse's petition for a writ certiorari.

Respectfully submitted

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